Mohd Naki bin Mohd Yusuf v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–164 OF 2010
SULAIMAN DAUD, SYED AHMAD HELMY AND APANDI ALI JJCA
28 MAY 2012

Criminal Law — Murder — Circumstantial evidence — Appeal against conviction and sentence — Whether evidence showing culpability of accused overwhelming — Whether accused failed to offer explanation to rebut irresistible inference he committed crime — Whether no error committed by trial judge in finding accused guilty

The appellant was convicted of murder and sentenced to death by the High Court for killing his wife's lover ('the deceased') whose body was found in a decomposed state in a water tank at a factory. The pathologist's report attributed the cause of death to brain injury caused by trauma from a blunt object. The appellant's conviction was based on circumstantial evidence and largely on the testimonies of his estranged wife, SP18, and his two children, SP16 and SP17. The two children testified that sometime in April 2007 the deceased had come to their house and that an argument broke out between the appellant and him and SP16 saw the appellant hitting the deceased with an iron rod. SP18 testified that she was also involved in the quarrel with the two men that day. Police recovered an iron rod and machete from the appellant's house while blood samples taken from a wall in the house was found to contain the deceased's DNA. The trial judge found the appellant's defence to be wholly made up of bare denials and afterthoughts. In his instant appeal against conviction and sentence the appellant said the trial judge, inter alia, (i) failed to consider that SP18's evidence was unreliable as she had a motive to 'fix him up' for the murder (ii) failed to adequately consider the absence of the appellant's DNA on the iron rod and at the alleged place of incident and (iii) having been the third judge to have presided over the trial, he could not have evaluated the demeanour of witnesses who had testified before he took charge of the case.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The DNA profile of the deceased was obtained from the bloodstain on the wall of the appellant's house. That evidence had to be considered against the presence of the deceased's body with multiple injuries floating in the water tank which impelled the inference of the appellant's culpability as the person who caused the deceased's death. There was no explanation from the appellant on this aspect of the evidence. An explanation from him was imperative in the light of the consistency in the

evidence of the pathologist and that of SP16 who saw the appellant hitting the deceased with the iron rod (see para 14).

(2) Although the trial judge did not direct his mind to SP18's motive vis-à-vis the appellant, nevertheless that failure did not absolve the appellant as there was overwhelming circumstantial evidence attaching culpability on him for the murder. The cumulative effect of the evidence of SP16, SP17 and SP18 was more than sufficient to support the findings and conclusion of the trial judge (see para 22).

(3) The trial judge was not wrong to have relied upon and evaluated the recorded evidence of his predecessors in arriving at his decision. The adoption of such a procedure could not be said to tantamount to insufficient judicial appreciation of the evidence (see para 24).

(4) The trial judge adhered to the guidelines and applied the correct principles in evaluating the circumstantial evidence in arriving at his decision. The case was essentially based on findings of facts which were not perverse and thus it did not warrant appellate intervention. The conviction was safe (see para 25).

[Bahasa Malaysia summary

Perayu disabitkan dengan pembunuhan dan dihukum mati oleh Mahkamah Tinggi kerana membunuh kekasih isterinya ('si mati') yang mayatnya dijumpai dalam keadaan reput di dalam tangki air di kilang. Laporan patologi memberikan sebab kematian kepada kecederaan otak disebabkan oleh rasa terkejut daripada objek tumpul. Sabitan perayu adalah berdasarkan keterangan keadaan dan sebahagian besarnya atas keterangan isterinya yang telah berpisah, SP18, dan dua anaknya, SP16 dan SP17. Kedua-dua kanak-kanak tersebut memberi keterangan bahawa suatu ketika pada bulan April 2007 si mati telah datang ke rumah mereka dan pertengkaran berlaku antara perayu dan si mati dan SP16 melihat perayu memukul si mati dengan batang besi. SP18 memberi keterangan bahawa dia juga terlibat di dalam pertengkaran dengan kedua-dua lelaki pada hari itu. Pihak polis memperolehi batang besi dan sebatang parang daripada rumah perayu sementara sampel darah yang diambil daripada dinding rumah didapati mengandungi DNA si mati. Hakim perbicaraan mendapati pembelaan perayu secara keseluruhannya adalah rekaan penafian semata-mata dan sesuatu yang difikirkan kemudian. Perayu dalam rayuan ini terhadap sabitan dan hukuman menyatakan hakim perbicaraan, antara lain, (i) gagal untuk mempertimbangkan bahawa keterangan SP18 tidak boleh dipercayai memandangkan dia mempunyai motif untuk 'fix him up' untuk pembunuhan (ii) gagal untuk mempertimbangkan sewajarnya ketiadaan DNA perayu atas batang besi dan di tempat kejadian yang didakwa dan (iii) sebagai hakim ketiga yang mendengar perbicaraan tersebut, beliau tidak dapat menilai

perilaku saksi-saksi yang memberi keterangan sebelum beliau mengambil alih kes tersebut.

Diputuskan, menolak rayuan dan mengekalkan sabitan dan hukuman

(1) Profil DNA si mati diperolehi daripada kesan darah di dinding rumah perayu. Keterangan tersebut patut dipertimbangkan terhadap wujudnya mayat si mati dengan pelbagai kecederaan terapung di dalam tangki air yang mendorong inferens kebersalahan perayu sebagai orang yang menyebabkan kematian si mati. Penjelasan daripada dia adalah penting berdasarkan konsistennya keterangan patologi dan SP16 yang melihat perayu memukul si mati dengan batang besi (liha perenggan 14).

(2) Walaupun hakim perbicaraan tidak mengarahkan dirinya kepada motif SP18 vis-à-vis perayu, walau bagaimanapun kegagalan tersebut tidak membebaskan perayu kerana terdapat keterangan keadaan yang mencukupi yang meletakkan kebersalahan ke atasnya untuk pembunuhan. Kesan kumulatif keterangan SP16, SP17 dan SP18 lebih mencukupi untuk menyokong dapatan dan kesimpulan hakim perbicaraan (lihat perenggan 22).

(3) Hakim perbicaraan tidak salah kerana bergantung dan mempertimbangkan keterangan yang direkodkan oleh hakim-hakim terdahuklu dalam mencapai kepada keputusannya. Penggunaan prosedur sedemikian tidak dapat dikatakan menjumlahkan kepada penilaian kehakiman terhadap keterangan yang tidak mencukupi (lihat perenggan 24).

(4) Hakim perbicaraan mematuhi garis panduan dan mengguna pakai prinsip yang betul dalam mempertimbangkan keterangan keadaan dalam mencapai kepada keputusannya. Kes tersebut pada asasnya berdasarkan dapatan fakta yang tidak bercanggah dan oleh itu tidak mewajarkan campur tangan mahkamah rayuan. Sabitan adalah selamat (lihat perenggan 25).]

Notes

For cases on circumstantial evidence, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1472–1476.

Cases referred to

Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] CLJ 309, FC (folld)

PP v Hanif Basree bin Abdul Rahman [2008] 3 MLJ 161; [2008] 4 CLJ 1, FC (refd)

Legislation referred to

Penal Code s 302

Appeal from: Criminal Trial No MT 45–193 of 2007 (High Court, Shah Alam)

(Ahmad Nizam & Co) for the appellant.
Rosidah bt Abu Bakar (Deputy Public Prosecutor, Selangor State Prosecution Unit) for the respondent.

Syed Ahmad Helmy JCA:

[1] The appeal herein emanates from the decision of the Shah Alam High Court in convicting the appellant for the offence of murder under s 302 of the Penal Code.

[2] The charge was for the murder of a Pakistani national by the name of Norshad (holder of Passport No AB 9613051) and upon conviction the learned High Court judge sentenced the appellant to death.

[3] The conviction of the appellant was based on circumstantial evidence. The narrative of the prosecution's case which led to the culpability of the appellant was centred on the evidence of the appellant's estranged wife SP18 and his two children SP16 and SP17.

[4] It was the testimony of SP18 that there was a quarrel between her the appellant and the deceased about a month prior to her lodgement of a missing person police report on 20 May 2007, which led her to leave their matrimonial home to stay with her parents in Sungei Besi. On 14 April 2007 the appellant turned up at her parent's home with his two children SP16 and SP17 leaving them there as he had to leave as something had happened at the factory.

[5] SP16 and SP17 testified that sometime in April 2007 the deceased came to their rented house and an argument broke out between the appellant and the deceased. SP16 saw the appellant hit the deceased with an iron rod. When they woke up the next day the deceased was nowhere to be seen.

Police investigation recovered an iron rod (P22A) and a machete from the appellant's house. The iron rod was found to contain some blood but no DNA profiling was obtained.

[6] The police forensic team collected some samples believed to be blood from the appellant's house. The examination and analysis conducted on a specimen marked A1 obtained from the wall of the house confirmed that it contained DNA of the deceased.

[7] The other pertinent circumstantial evidence was the testimony of SP11

an employee of the appellant and the deceased. He testified that the last time he saw deceased was before 30 April 2007 and when he came back to work on 4 May 2007 the deceased was nowhere to be found. SP11 also last saw the appellant on 30 April 2007.

[8] The deceased's decomposed body was found in a water tank within the factory on 22 May 2007 by SP2, a police officer who came to the scene after being informed of a foul smell by SP11. The cause of death was found by the pathologist SP14 to be head injury or injury to the brain. The facial bones were smashed and it could be caused by a blunt object such as a piece of wood or iron rod.

[9] Based on the evidence as presented by the prosecution the learned trial judge upon conducting a maximum evaluation thereof was satisfied that a prima facie case has been established warranting the calling of the defence of the accused.

[10] The appellant's defence which was given under oath was a series of denials — denied that the deceased came to the house on the night in question, denied having seen the murder weapon P26C, denied that the telephone number 'sender' Shah, +60146600244 belonged to him and sending an SMS in P30 (1–7) therefrom, and denied the contents of the police report P46 made by SP18 pertaining to the telephone call from telephone No 0146600244 made by the appellant to her. The appellant also testified that the reason behind leaving the two children SP16 and SP17 with SP18 to work in Johor was not to run away but because of the threat by SP18 not to come back to the home as long as the appellant is around.

[11] The learned trial judge after evaluating the defence against the totality of the evidence adduced found that the defence was one anchored on bare denials and afterthought.

[12] In the appeal before us learned counsel for the appellant advanced five grounds of appeal as follows:

(a) the trial judge failed to give adequate consideration of the absence of the appellant's DNA on the murder weapon and at the place of incident;

(b) the break in the chain of evidence arising from the failure to conduct investigation on Shah as the sender of the SMS message to SP18 on the 23 May 2007 through telephone No 0146600244;

(c) the error of the trial judge to evaluate the evidence of the pathologist SP14 of the possibility of the head's detachment from the body through

decomposition and not through the assault on the head with a blunt object as testified by the first investigating officer;

(d) failure by the trial judge to consider the motive of SP18; and

(e) the trial judge being the third judge who presided in the conduct of the trial was in no position to evaluate the demeanour of the testimonies of the earlier witnesses and fully consider the evidence adduced.

[13] On the challenge against the DNA evidence the thrust thereof is the absence of the DNA profile of the appellant on the deceased's body floating in the water tank and the exhibits of the murder weapon.

[14] DNA evidence is now a very potent weapon of forensic science which is widely used to assist in proof of identity. In the factual matrix herein the DNA profile of the deceased was recovered and obtained from the bloodstain on the wall of the appellant's home. The recovery of the bloodstain has to be looked against the presence of the deceased's body with multiple injuries floating in the water tank which impels the inference of the appellant's culpability as the person who caused the death of the deceased. There does not appear to be any explanation proffered by the appellant on this aspect of the evidence. An explanation from the appellant is imperative in the light of the consistency in the evidence of the pathologist SP14 and the appellant's daughter SP16 who perceived with her own eyes the appellant hitting the deceased with the iron rod — *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2008] 3 MLJ 161; [2008] 4 CLJ 1.

[15] It should be recalled that the learned judge's conclusion was derived from his evaluation of the circumstantial evidence, wherein it is trite the guiding element is the cumulative effect of all the evidence Which leads to the irresistible conclusion of the sole culpability of the appellant in the commission of the crime. We are of the considered view that the learned trial Judge adhered to the guidelines and applied the correct principles in evaluation of circumstantial evidence in arriving at his decision. Accordingly we dismiss the appellant's challenge on the first ground aforesaid.

[16] Coming to the second ground, on the failure of the investigating officer to conduct investigation on Shah as the sender of the SMS message via telephone No 0146600244 to SP18 on the 23 May 2007 we agree with the findings of the learned trial judge that it does not affect the core of the prosecution's case and does not amount tb a break in the chain of evidence.

[17] In concluding that the failure as such is not fatal the learned trial judge was impressed with the demeanour of SP18 whom he found was a reliable witness whose evidence of the telephone No 0146600244 as belonging to her

husband (the appellant) was given spontaneously and was reflected in her police report P46 which was made as early as 20 May 2007. The learned trial judge rationalised that the non-calling of the telecommunication company personnel as a witness is at best neutral as it is public knowledge that registration does not prevent the usage of the registered number by others. The fulcrum of the basis of his finding was the direct testimony of SP18 that the number was that of the appellant. The challenge on the second ground must correspondingly in our view, fail.

[18] On the third ground of challenge pertaining to the pathologist evidence of the possibility that the detachment of the head from the body could be occasioned by decomposition, we are of the considered view that the challenge is misplaced and is without merits.

[19] A close scrutiny of the pathologist SP14's evidence shows that the head injury and the crushed facial bone which led to the trauma on the brain of the deceased. The injury as such was according to the pathologist caused by a blunt object like a piece of wood or an iron rod. The body of the deceased was found in a water laden underground tank which accelerated the death occasioned by the trauma to the brain.

[20] The aforesaid cogent piece of evidence of the pathologist was accepted by the trial judge and we see no grounds to depart.

[21] On the issue of motive, though it is not an element of a murder charge nevertheless it is a relevant fact to be taken into consideration. The challenge by the appellant is that the estranged wife SP18 who was having a love affair with the deceased had the requisite motive to fix up the appellant with the murder of the deceased. The motive is further amplified by the threats of SP18 on several occasion to send the appellant to prison. Hence it is totally unsafe to convict the appellant without giving adequate consideration to the motive of SP18 which would have a negative bearing on the element of intention on the part of the appellant in causing the death of the deceased.

[22] The learned trial judge addressed his mind to the motive factor. At p 232 of the appeal record he found that the marital relationship between the appellant and SP18 had broken down occasioned by frequent quarrels. Jealousy would invariably envelope the appellant upon seeing the deceased establishing a close relationship with SP18, the level of jealously being dependent on the individual capacity to cope. In the circumstances we are of the view that though the trial judge did not direct his mind to the motive of SP18 vis-a-vis the appellant nevertheless the failure as such does not absolve the

appellant from his culpability. This is because there is overwhelming circumstantial evidence to attach culpability on the appellant for the murder of the deceased.

[23] On the final ground of challenge, though it is true that the trial judge being the third judge who presided and continued with the trial without having the advantage of ascertaining the demeanour of witnesses whose testimony was recorded by his predecessors nevertheless we have adopted the approach and the principles governing appellate intervention as laid down in the Federal Court case of *Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] CLJ 309 in that:

> … the central feature of appellate intervention is to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In doing so the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. … a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting this whole or part of the evidence placed before him.

[24] On the totality of the evidence presented we see no error on the part of the learned trial judge to rely and evaluate the recorded evidence of his predecessors to arrive at the decision. The adoption of such a procedure by the learned trial judge cannot be said to tantamount to insufficient judicial appreciation of evidence.

[25] The cumulative effect of the evidence of SP16, SP17 and SP18 was more than sufficient evidence to support the findings and conclusion of the learned trial judge. The case herein in essence is based on findings of facts which we have found was not perverse for appellate intervention. The conviction is safe. The appeal is accordingly dismissed. Conviction and sentence of the High Court affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar